83 - 1570

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

Donald L. Bachman, et al.

Wanda D. Foster and Terrence Willingham,

Petitioners,

vs.

James Miller, Chairman, Federal Trade Commission.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Whether Mennonite Board of Missions v. Adams entitles Petitioners to timely mailed actual notice when the Government conceded it could reasonably identify Petitioners and had available addresses?

A. Whether the Government's failure to provide timely mailed actual notice violated Petitioners' due process right to submit objections to the settlement order at the fairness hearing?

B. Whether the alleged notice provided Petitioners was sufficient to constitute the voluntary and knowing waiver of Petitioners' Article III, Due Process, and Title VII Rights?

C. Whether the District Court has a duty to insure that absent class members' Articles III, Due Process, and Title VII Rights are protected?

II. Whether the Lower Court erred by holding that Petitioners' motion for relief from judgment was untimely when no final reviewable judgment had been entered by the District Court, to commence the time running?

III. Whether the District Court, pursuant to the 1976 Magistrates Act, can delegate final non-reviewable authority to the United States Magistrate?

A. Whether the District Court can delegate its jurisdiction to issue nonreviewable final judgements by contract and avoid the statutory requirements of the 1976 United States Magistrates Act?

B: Whether the lack of subject matter jurisdiction can be raised at anytime?

C: Whether the delegation of final non-reviewable authority in the United State's Magistrate violates Article III of the United States Constitution?

1. Whether Article III of the United

States Constitution is a nonwaivable right?

IV. When discrimination is conceded by the Government, are Petitioners entitled to "make whole" relief and the benefits of a Stage II, Title VII review?

PARTIES TO THE PROCEEDINGS

The petitioners, WANDA D. FOSTER and TERRENCE WILLINGHAM, are black class members who filed timely claims for individual relief pursuant to a court approved settlement order. The petitioners' claims were denied by the Federal Trade Commission Administrator; they appealed to a United States magistrate who, by order dated July 27, 1981, denied the petitioners' claims. The respondent is James Miller, Chairman of the Federal Trade Commission.

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TO THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

AND THE DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

Terrence Willingham, on behalf of the petitioners Wanda D. Foster and Terrence Willingham, petitions for a writ of certiorari in this case to review the judgments of the United States District Court for the District of Columbia and its summary affirmance by the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) was entered on November 7, 1983 and is unreported. The opinion of the district court is reported at 559 F. Supp. 150 (App. C). The Magistrate's decision was rendered on July 27, 1981. The petitioners first attempted to appeal the Magistrate's decision to the Court of Appeals on November 16, 1981, CA. 81-1906.

JURISDICTION

The District Court decision was rendered on November 3, 1982. The judgment of the Court of Appeals was entered on November 7, 1983. Rehearing was denied on January 10, 1984. The time for filing a petition for writ of certiorari was extended to April 9, 1984, and this petition is timely filed. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES AND LAWS INVOLVED

The United States Constitution, Article III,

Section 1.

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, public ministries and consuls; to all cases of admirality and maritime jurisdictions to contr - oversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under Grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects.

The United States Constitution, Fourteenth Amendment:

> Section 1.
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Constitution, Fifth Amendment:

> No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. 1291:

> The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circut shall be limited to the jurisdiction

described in sections 1292(c) and (d) and 1295 of this title.

The United States Magistrates Act (as amended 1976), Public Law 94-577, 94th Congress, 28 U.S.C. 631 et. seq. (Cited since there are no "consent provisions")

The Federal Rules of Civil Procedure, Rule 60(b), Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons . . .
>
> (4) the judgment is void; . . .
> (6) any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and, for reasons (1), (2), and (3) (not cited herein), not more than one year after the judgment, order, or proceeding was entered or taken.

The Federal Rules of Civil Procedure, Rule 54, (a) and (b):

> (a) Definition: "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall

not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The United States District Court Rules for the District of Columbia, Rule 3-8 (1978).

STATEMENT OF THE CASE

On January 13, 1976, plaintiff Donald L. Bachman brought a class action in the United States District Court for the District of Columbia alleging racial discrimination in employment at the United States Federal Trade Commission ("F.T.C."). Invoking Title VII, 42 U.S.C. 2000e et seq. and 42 U.S.C. 1981, he sought actual and punitive damages for himself and his class, including court-ordered injunctive relief, a wide-ranging affirmative action program, and other relief. On July 29, 1976, the court certified a broad class of professional and semi-professional black F.T.C. employees, applicants for employment, and former employees. Bachman v. Collier, 73 F.R.D. 300 (D.D.C. 1976). Petitioners are conceded members of this class.

On January 17, 1978, counsel for the parties filed a proposed settlement, which called for an affirmative action program and provided, as well, for the submission of all individual discrimina-

tion claims to the F.T.C. Secretary, acting as Administrator of the settlement. (App. at 114)* Those claimants dissatisfied with the decision of the Secretary were entitled to present their claims to the United States Magistrate. The Magistrate's decision was to be final and unappealable. (App. at 119-120)

On February 2, 1978, the Court ordered that the proposed settlement be sent to each class member "who can reasonably be identified and located," and that a notice of the proposed settlement be published in designated newspapers and distributed to certain law schools. (App. at 60) Petitioners' names and addresses were available to the F.T.C. at all relevant times, (App. at 103, 105, 107); however, notice was not mailed

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* When "App. at ____" is referenced, it refers to the appendix submitted to the Court of Appeals for the District of Columbia.

to either of them. [1] On April 25, 1978, the Court approved the settlement. (App. at 114)

Petitioners learned of the settlement indirectly, [2] after it had been approved by the Court, and proceeded to contact plaintiff's counsel. He advised them of their right to file claims with the F.T.C. Secretary and, if dissatisfied, with the United States Magistrate "for formal hearing and disposition." (App at 109) Petitioners proceeded to file claims with the F.T.C. In the case of petitioner Wanda Foster (who was evaluated by respondent as "exceptionally well qualified"), the F.T.C. found "no legitimate non-discriminatory reason why she had not been hired," and offered her $1,000 in settlement of her claim. (App. at 111) Believing the proposed settlement consideration too small,

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[1] Petitioners do not know how many other class members were not sent notices of the settlement.

[2] Not from the published or posted notices, but by word of mouth.

Petitioner Foster appealed to the Magistrate in order to obtain the actual backpay to which she was entitled. The claim of the other petitioner, Terrence Willingham (evaluated by respondent as "well qualified"), was denied by the F.T.C., and he, too, appealed to the Magistrate. Petitioners' claims constituted two of a total of twenty-nine claims presented for disposition to the Magistrate pursuant to the settlement order. The Magistrate denied all the claims in a one sentence disposition dated July 27, 1981. (App. at 99) He did not make specific findings of fact or conclusions of law or otherwise set forth the basis for his ruling.

Petitioners learned that the Magistrate's decision was to be unappealable more than sixty days after the order had been entered, and, thus, after it was no longer presumptively appealable

as a final order. [3] (App. at 104, 106, 108) Believing the non-appealability provision to be erroneous as a matter of law, but reasoning that any appeal from the Magistrate's decision to the District Court would necessarily be a futile act, Petitioners appealed the Magistrate's decision to the Court of Appeals.

> An appeal of a final decision of the United States District Court to the District of Columbia in Bachman v. Pertschuk, Civil Action No. 76-0079 by the United States Magistrate denying their claims on the grounds that petitioners' evidence had been effectively rebutted by the government. ("Petitioners Brief and Appendix," Appeal #81-1906, at 3.)

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[3] Given that the only issue actually adjudicated by the Court was the claim for injunctive relief, and that individual relief and attorney's fees remained to be determined, it is unlikely that the Court's April 25, 1978 order qualifies as a "final order," as the Court below held. (App. at 113) See Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976); Laffey v. N.W. Airlines Inc., 642 F. 2d 578 (D.C. Cir. 1980).

The F.T.C. moved to dismiss and the Court of Appeals summarily granted the motion by order dated February 16, 1982. (App. at 101)

Petitioners thereupon returned to the District Court and, by new counsel, appellants Foster and Willingham moved for vacation of the non-appealability provision of the District Court's April 25, 1978 order. On November 3, 1982, the District Court denied the motion. (App. at 112) Petitioners filed timely notices of appeal. On November 7, 1982 a panel of the United States Court of Appeals for the District of Columbia summarily affirmed the District Court's decision. Petitioners' request for reconsideration or, in the alternative, en banc consideration was denied on January 10, 1984.

STATEMENT OF THE FACTS

Petitioners are black attorneys who claimed below to have been discriminatorily denied employment at the F.T.C. For petitioner Foster, the

discrimination was conceded by the F.T.C. during the administrative phase of the proceedings. (App. at 111)

The first of the petitioners to become aware of the settlement was Petitioner Willingham. By letter dated May 31, 1978 (App. at 109) class counsel advised him of the Court's April 25, 1978 order. Counsel enclosed a claim form for Mr. Willingham's use should he wish to file a claim. The other petitioners subsequently received an identical letter upon application to class counsel. (App. at 103, 105, 107) The letter recited, in pertinent part, as follows:

> The settlement provides that all claims will be submitted to Mr. Carroll Thomas, Secretary of the Federal Trade Commission who, under the provisions of the settlement stipulation, shall have 30 days within which to settle each individual claim. If a class member is unable to reach a settlement with Mr. Thomas, his or her claim will be forwarded to a United States Magistrate for formal hearing and disposition. In both the settlement procedures with Mr. Thomas and in the proceedings before the United States Magistrate, each class member may be assisted or represented by counsel.

Petitioners filed timely claims with the F.T.C. and subsequently appealed to the United States Magistrate. Petitioner Foster appealed solely for the purpose of contesting, as insufficient (see Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the $1000 offered by the F.T.C. for its conceded discrimination in her case, the Administrator having advised that he could find no "legitimate non-discriminatory reason" why she had not been hired. (App. at 111) This concession was included in the record before the Magistrate. Petitioner Willingham appealed the denial of his claim by the F.T.C. to the United States Magistrate.

The settlement order, which was deemed a final order by the Court below, was characterized by the following features: (App. at 113)

1. It was binding on all members of a very broadly defined class;
2. It lacked any provision for opting out of the class;

3. It abrogated the rights of class members to submit discrimination claims to the Equal Employment Opportunity Commission or, subsequently, to the United States District Court for a determination of the merits of those claims and for relief available under those claims in accordance with Title VII standards and Article III of the United States Constitution; (App. at 120-121)

4. It included a waiver of all claims of racial discrimination in employment by and on behalf of all class members against the F.T.C. without Stage II benefits; (App. at 120-121)

5. It included a covenant that no class member would in the future sue the F.T.C. over any employment discrimination claim. (App. at 120)

In return, the class members obtained the right to submit their discrimination claims to

the F.T.C. Administrator and subsequently, should they so desire, to the the United States Magistrate. The Magistrate could enter judgment on these claims without regard to Title VII standards [4] and without stating findings of fact, conclusions of law or, indeed, any reasons whatsoever. His ruling would be final and unappealable. (App. at 119-120) Apart from this claims procedure, the class members received nothing.

At all relevant times, the F.T.C. had addresses for each of the petitioners (App. at 103, 105, 107); however, the F.T.C. did not provide petitioners with the proposed settlement, despite the Court's February 25, 1978 order requiring such notice. (App. at 60)

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[4] Except with regard to a specified subclass of claimants, of which petitioners were not members. See Settlement Order ¶ VIII(4). (App. at 120) It also was interpreted as not placing class members in the position of Stage II class claimants. This resulted in reinvestigation and relitigation of individual class members' claims without Title VII safeguards.

The Magistrate's order of July 27, 1981 denied all twenty-nine claims, including petitioners, presented for disposition in one sentence.

> The F.T.C. has met its burden of articulating a legitimate non-discriminatory reason why each individual claimant was not hired or promoted and that the proffered reason was not a pretext for racial discrimination. (App. at 100)

The Magistrate presented no findings of fact, conclusions of law, or other reasons for his decision. There was no justification for the Magistrate's choice of the legal standard applied to reviewing these " Stage II" claims. No mention was made of the F.T.C.'s contrary concession of record in the cases of Petitioner Foster and at least one other claimant. [5]

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[5] The Magistrate erroneously observed that only claimants "dissatisfied with a finding of no discrimination" by the F.T.C. had appealed to the Magistrate, thus ignoring claimants like Foster who sought greater relief for discrimination, conceded by the F.T.C. in the administrative phase. (App. at 99)

Following their first unsuccessful appeal of the Magistrate's decision to the Court of Appeals, petitioners moved the District Court to vacate the non-appealability provision of the settlement order on the ground that it constituted an impermissible delegation to a Magistrate of the authority to issue unreviewable final decisions on their Title VII claims. The District Court denied the motion, holding that the claims determined by the Magistrate were not Title VII claims but newly-created contractual claims arising solely under the settlement order, which was a final order entered by an Article III Judge. (Appendix at 113 and App. C)

On April 21, 1983, petitioners appealed the District Court's decision to the United States Court of Appeals for the District of Columbia. On November 7, 1983, that court affirmed the lower court's decision. On December 16, 1983, petitioners moved for rehearing and/or rehearing

en banc. That motion was denied on January 10, 1984. (App. A)

REASONS FOR GRANTING THE PETITION

I. Introduction

The District Court's decision and the Court of Appeals summary affirmance violates Article III, the Fifth, and the Fourteenth Amendments of the United States Constitution. Furthermore, these decisions are in direct conflict with several Supreme Court decisions, decisions of the Circuit Court of Appeals for the District of Columbia, and decisions of numerous other Courts of Appeals.

First, petitioners contend that they were entitled to mailed actual notice. The lower court's contrary decision is in direct conflict with Mennonite Board of Missions v. Adams, _U.S._ 103 S. Ct. 2706 (1983). Furthermore, the decision placed an impermissible burden upon the petitioners to protect their fundamental rights,

relieving the Government of its constitutional obligation. The Court of Appeals erred in considering the petitioners' professional status in determining the type of notice required. The Court also erred in treating, as actual notice, a letter to class counsel solely addressing the claims procedure, contrary to the Court of Appeals mandate in United States v. Trucking Employers, Inc., 561 F.2d 313 (D.C. Cir. 1977); and the Fifth and Ninth Circuits' opinions in EEOC v. Time-DC Freight, Inc., 659 F.2d 690 (5th. Cir. 1981); Mandujano v. Basic Vegetable, Inc., 541 F.2d 832 (9th. Cir. 1976).

The entry of the settlement was not a final order under Rule 54 Federal Rules of Civil Procedure. Petitioners' position in this regard is supported by this Court's decision in Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 757 (1976), the Circuit Court of Appeals for the District of Columbia's decision in Laffey v. Northwest Airlines, Inc., 642 F.2d 578 (D.C.

Cir. 1980), and decisions of eleven other Courts of Appeals. In direct conflict with these decisions, the Court of Appeals affirmed the District Court's decision that its April 25, 1978 order was final.

Furthermore, contrary to this Court's guidance in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982), on the limits of subject matter jurisdiction, which can be raised at anytime, the panel affirmed the District Court's authority to confer subject matter jurisdiction to render final and unreviewable authority on the United States Magistrate contrary to the mandate of Article III of the United States Constitution, and the opinions of this Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., U.S. 102 S. Ct. 2858 (1982), and United States v. Raddatz, 447 U.S. 667 (1980), and the specific holdings of several Courts of Appeals declaring that conferring final

order authority on a magistrate is unconstitutional.

The Circuit Court's blanket determination that petitioners' Rule 60(b) motion was not filed in a reasonable time is contrary to established case law and statutory interpretation since there was no final judgment rendered by an Article III judge and since this Court decided that lack of subject matter jurisdiction can be raised at any time.

The Government, with the District Court's approval, submitted a convoluted contract's argument conferring total authority on the magistrate to make absolute, final and unreviewable decisions regarding each class member's claim with the District Court abrogating its fiduciary duty to supervise the magistrate and issue the "ultimate decision." Contrary to this contractual theory, however, the District Court retained jurisdiction to alter, amend or clarify the order itself. This is contrary to the Ninth Circuit's

opinion in Pacemaker Diag. Clinic v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), and the Third Ciruit's holding in Wharton-Thomas v. United States, 3rd Cir., No. 82-5555 (1983), that the "ultimate decision" must be made by an Article III Judge. This is a non-waivable right.

The Circuit Court of Appeals affirmed a lower court decision that squarely conflicts with a substantial number of federal Court of Appeals' decisions on the same or similar issues in dispute (on one issue, it is contrary to the unanimous holding of the federal circuit courts of appeals). This decision clearly departs from the accepted and usual course of a judicial proceeding, and sanctions such a departure by the lower court in the areas of constitutional law, Title VII, and the Magistrate's authority. It demands the exercise of this Court's power of supervision.

II. Argument

A. Petitioners are entitled to timely, mailed actual notice sufficient in content to

advise them of any required voluntary and knowing waiver of their rights.

The decision of the Court of Appeals for the District of Columbia squarely conflicts with this Court's decision in Mennonite Board of Missions v. Adams, supra, denying petitioners entitlement to mailed actual notice. The decision is in direct conflict with other decisions rendered by this Court and the District of Columbia Circuit's own ruling.

This Court, in Mennonite Board of Missions v. Adams, supra, reaffirmed its "per se" rule against constructive notice when a party can reasonably be identified. Accord Greene v. Lindsey, 456 U.S. 444 (1982); Schroeder v. City of N.Y., 371 U.S. 208 (1962); New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 296 (1953).

The District Court, pursuant to Rule 23(e) Federal Rules of Civil Procedure, issued an order defining notice to be provided to class members

and directing that mailed notice be provided to class members who could be reasonably identified. (App. at 60) In Mennonite, supra, this Court held that:

> When the mortgagee [petitioners] is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagor's [petitioner's] last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane. (footnote omitted)

103 S.Ct. at 2711. Here, the F.T.C. has conceded that petitioners were not provided with actual mailed notice despite the fact that their identities and current addresses were included in their personnel files (public record). Instead, the F.T.C. objected to searching through voluminous records in attempting to identify potential class members entitled to actual mailed notice. The F.T.C.'s reliance on the sheer volume of the files in question, which is not extraordinary in

a large class action case, has been rejected by this court in Mennonite, id.

The facts establish that: (1) the petitioners' records were located by the F.T.C. in its own files; (2) the files contained the petitioners' last known available addresses; and (3) petitioners were not provided actual mailed notice. The District Court's decision, affirmed by the Court of Appeals, is squarely contrary to this Court's holding in Mennonite Board of Missions v. Adams, supra, and the prior decisions of this Court. This Court's numerous decisions establishing its "per se" rule against constructive notice along with the established facts clearly support petitioners' entitlement to mailed actual notice which they did not receive. The failure to give notice violated petitioners' due process rights. [6]

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[6] The Court of Appeals ignored the F.T.C.'s concession that petitioners did not receive actual notice. (Resp. Br. 3-4)

The Court of Appeals erroneously relied on constructive notice to and by class counsel as actual or reasonable notice to the petitioners (not all class members were represented by class counsel). This is a unique holding unsupported by any case law and, once again, contradicts this court's holding in Mennonite, supra, (wherein class counsel is in a status similar to the property owner). This Court stated that:

> Neither notice by publication and posting, nor mailed notice to the property owner, are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to acomplish it." (citation omitted). . . . Notice to the property owner [settlement counsel], who is not in privity with his creditor and who failed to take steps necessary to preserve his own property interest, also cannot be expected to lead to actual notice to the mortgagee [Petitioners]. The county's use of the less reliable form of notice is not reasonable where, as here, "an inexpensive and efficient mechanism such as mailed service is available." (citation omitted)

103 S. Ct. at 2711. Settlement counsel's letter, did not contain the settlement order or mention or advise petitioners that submission of a claim would waive their Article III and due process rights. This letter was insufficient in content to fully inform petitioners' of their rights waived and violated the Circuit Court of Appeals for the District of Columbia's own mandate regarding notice, in United States v. Trucking Employers, Inc., supra, wherein the court held that all subsequent waivers or notices must be in laymen's terms to be a sufficient knowing waiver of a federal remedial right. See EEOC v. Time-DC Freight, Inc., supra; Mandujano v. Basic Vegetables, Inc., supra.

Settlement counsel's letter, declared by the Circuit Court of Appeals as reasonable notice, was not only deficient in content, but was untimely, failing to provide petitioners with sufficient notice of the fairness hearing to allow them to participate. In Mullane v. Central

Hanover Trust Co., 339 U.S. 306 (1950), this Court stated that:

> This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. 339 U.S. at 314.

* * *

This Court then held, as follows:

> . . . [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection. (citation omitted) The notice must be of such nature as reasonably to convey the required information, (citation omitted) and it must afford a reasonable time for those interested to make their appearance. 339 U.S. at 314 (Emphasis added.)

Petitioners were thus denied the opportunity to present their objections at the March 27, 1978, objectors hearing. "But when notice is a person's due, process which is a mere gesture is not due process." Mullane, id., at 315. Clearly,

notice, as ordered by the court pursuant to Rule 23(e) Federal Rules of Civil Procedure, entitling petitioners to actual notice, was not complied with and fails to meet constitutional muster.

The Court of Appeals, affirming the District Court, accepted at face value that petitioner's had waived their constitutional rights. The Court of Appeals ignored this Court's well-established rule that "there can be no prospective waiver of an employee's rights under Title VII." Alexander v. Gardner-Denver Co., 415 U.S. at 51. What the settlement stipulation and the resulting order of April 25, 1978, did was precisely this; it waived, prospectively, the petitioners' rights to a judicial determination of their claims and judicial review of an adverse decision. This was impermissible.

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would

> defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver. Alexander v. Gardner-Denver Co., 415 U.S. at 51.

This Court's well-established rule regarding prospective waiver especially encompasses any attempt to waive petitioner's rights by a third party as was the case in the instant appeal. Even where an employee expressly purports to waive Title VII rights "as part of a voluntary settlement," a court;

> in determining the effectiveness of any such waiver, . . . would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. Alexander v. Gardner-Denver Co., 415 U.S. at 52 and 52 N.15.

The elements of a voluntary and knowing waiver are well-established in the Circuit Court of Appeals for the District of Columbia and its instant decision is not only in direct conflict with this Court's holding in Alexander v. Gardner-Denver Co., supra, but also its own de-

cision in United States v. Trucking Employers, Inc., supra, where the Court of Appeals held that a waiver:

> To be valid, . . . must be knowing and voluntary. It must be executed freely, without deception or coercion, with a full undertanding of [what] rights [are being waived]. 561 F.2d at 318.

There can be no doubt that this rigorous standard of waiver has not been met in this case. The Lower Court never inquired into whether constitutionally sufficient waiver was made. The Circuit Court of Appeals has clearly ruled contrary to this Court's holding and the law of its Circuit. It is hornbook law that "a waiver of a federal remedial right is not lightly to be inferred." Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5 Cir. 1981). In the instant case, there is simply no "evidence of waiver." See, EEOC v. Time - DC Freight Inc., 659 F.2d at 693.

B. The Lower Court's decision holding the April 25, 1978, order as final is in direct conflict with this Court's decision in Liberty Mutual Insurance Co. v. Wetzel and the unanimous holdings of the Circuit Courts of Appeals.

Petitioners argued in the lower court that, not only were they entitled to mailed actual notice but, assuming that the Circuit Court of Appeals ruled to the contrary, the April 25, 1978, settlement order was not final. The reasonable time calculation, therefore, does not commence to run until a final order is entered. The District Court's decision, affirmed by the Circuit Court of Appeals, is in direct conflict with this Court's holding in Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976), the District of Columbia Circuit Court of Appeal's decision in Laffey v. Northwest Airlines, Inc., supra, and the decisions of eleven (11) other Circuit Courts of Appeals.

In Liberty Mutual Insurance Co. v. Wetzel, supra, a Title VII, 42 U.S.C. §2000e et seq., cause of action, the Court defined a final judgment as follows:

> . . . The order, viewed apart from its discussion of Rule 54(b), constitutes a grant of partial summary

> judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory, see, Fed. Rule Civ. Proc. 56(b), on where assessment of damages or awarding of other relief remains to be resolved have never been considered to be "Final" within the meaning of 28 U.S.C. §1291. (Citation omitted) 424 U.S. at 744.

The District of Columbia Circuit Court of Appeals in Laffey v. Northwest Airlines Inc., supra, along with eleven (11) other Circuit Courts of Appeals adopted this Court's definition of a final judgment. The Circuit Court of Appeals in Laffey, a Title VII class action, specifically states the criteria which must be met in order to satisfy the finality standard:

> An order is final only when the court has resolved all disputed matters before it and need take no further action save to execute the judgment. The 1974 order did not meet this standard of finality because it left unadjudicated the calculations essential to ascertainment of the amount of back pay NWA owed each employee who was victimized by its Equal Pay Act and Title VII transgressions. It follows that Rule 60(b) interposes no barrier. 642 F.2d at 584.

Accord, Garzaro v. University of Puerto Rico, 575 F.2d 335 (1st Cir. 1978); Western Geophysical Co. v. Bolt Asso., Inc., 463 F.2d 101 (2nd Cir. 1972); Croker v. Boeing Co., 662 F.2d 975 (3rd Cir. 1981); United States v. Dember Const. Corp., 600 F.2d 11 (4th Cir. 1979); William v. Ezell, 531 F.2d 1261 (5th Cir. 1976); Donovan v. Hayden Stone Inc., 434 F.2d 619 (6th Cir. 1970); Barrett v. Grand Trunk West R.R. Co., 581 F.2d 132 (7th Cir. 1978); Wrist Rocket Manufacturing Co., Inc., v. Saunders Archery Co., 516 F.2d 846 (8th Cir. 1975); Maddox v. Black, Roberkist & Assoc., 303 F.2d 910 (9th Cir. 1962); Glass v. Pfeffer, 657 F. 2d 252 (10th Cir. 1981); Mullins v. Nickel Plate Co., 691 F.2d 971 (11th Cir. 1982).

The District Court's April 25, 1978 order clearly "did not meet the standard of finality because it left unadjudicated the calculations essential to the ascertainment of the amount of backpay", Laffey, 642 F.2d at 584, the entitlement of individual class members to relief, and

the assessment of attorney's fees. [7] The Government did not dispute the fact that the April 25, 1978 Order did not meet the well-established standards of finality.

The foregoing leads to the ineluctable conclusion that the lower court's decision was not final and the ruling squarely conflicts with this Court's holding and the unanimous holdings of the Circuit Courts of Appeals. This conflict, and a substantial error by the lower court, resulted in the Court of Appeals holding that Appellant's Rule 60(b)(4) and (6) motion had not been filed within a "reasonable time." (App. B)

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[7] The first attorney's fee was not awarded to settlement counsel until March, 1979. Bachman v. Pertschuk, 19 EPD ¶9044 (D.C. 1979). The individual class members' claims were delegated, pursuant to the settlement order to the F.T.C. to assess liability for the second time, without any guidance from the Court. Class members dissatisfied with the Government's decision could then appeal to an unsupervised magistrate having final and unreviewable judgment authority. A decision was rendered on July 21, 1981.

The Circuit Court of Appeals erred by calculating the "reasonable time" period from the entry of the "non-final" April 25, 1978 order. The District Court's November 3, 1982 order denying Appellants relief pursuant to Rule 60(b). Fed. Rule Civ. Proc. is the only final order meeting the "finality standard."

The right of appeal is a statutory right. It has been the historic practice of the federal courts, whether at law or in equity, to allow appeals only of final judgments, 28 U.S.C. 1291. [8] "Reasonable time" to appeal cannot commence until the entry of a reviewable final judgment. The Order denying Petitioner's motion pursuant to Rule 60(b)(4) and (6) was the sole final decision commencing the "reasonable time" calculation. Petitioner's motion under Rule 60(b)(4) and (6)

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[8] See also, 28 U.S.C. 1292. There are statutory exceptions to this rule, but they are inapplicable to the instant appeal. The exceptions are permissive and not mandatory.

was timely. See, V.T.A. Inc., v. Airco, Inc., 597 F.2d 220, 224 N.9 (10th Cir. 1979).

C. The April 25, 1978, order violates Article III of the United States Constitution and is in direct conflict with this Court's decisions and numerous decisions of the Circuit Courts of Appeals.

Not only did the Court of Appeals affirm the non-final, April 25, 1978 order of the District Court, it also affirmed an order which provided for the delegation of unreviewable final order authority in the United States Magistrate on Title VII claims submitted to him. Among the powers granted United States Magistrates by 28 U.S.C. §636, the power to render final decisions is absent. [9] This is by design, of course:

> In passing the 1976 amendments to the Federal Magistrates Act, Congress was alert to Art. III values concerning vesting of decision-making making

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[9] The District Court's own local rules 3-8 Duties and Powers of Magistrates, effective during the period in question, did not authorize conferring of final order authority on the Magistrate.

> power in magistrates . . . Congress reasoned that permitting the exercise of an adjudicating function by a magistrate, subject to ultimate review by the district court, would . . . pass constitutional muster . . . Accordingly, Congress made it clear that the district court had plenary discretion whether to authorize a magistrate to hold an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's total control and jurisdiction. United States v. Raddatz, 447 U.S. 667, 681, 681 N.8 (1980)

See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., _U.S._ , 102 S. Ct. 2858, 2877 (1982) (affirmed that "critical to the Court's decision to uphold the constitutionality of the Magistrate Act was the fact that the "ultimate decision" was made by the district court). The District Court did not retain the right to make the "ultimate decision" in the instant case. Its delegation of unreviewable authority to the magistrate in its April 25, 1978 order violates Article III of the United States Constitution and is in direct conflict with this Court's decision in United

States v. Raddatz, supra. The order is therefore rendered void, at least as regards the no-appeals provision.

In Simer v. Rios, 661 F.2d 655, (7th Cir. 1981) the Seventh Circuit Court of Appeals held that:

> Where an error of constitutional dimension occurs, a judgment may be vacated as void. One such constitutional error for concluding that a judgment is void for purposes of Rule 60(b)(4) is if the judgment was entered in violation of due process. Simer v. Rios, 66 F.2d at 663.

The April 25, 1978 order delegation of final and unreviewable authority to the United States Magistrate is an error of constitutional dimension.

This unconstitutional delegation of unreviewable final order authority in the United States Magistrate violates a further constitutional substantive right. Neither a District Court nor a party can waive an element of jurisdiction, which is necessary to the exercise of judicial

power, and confer it upon a United States Magistrate. Jurisdiction cannot be conferred where none exists. [10] Furthermore, where an improper delegation of subject matter jurisdiction is in question, the time constraints of appeal or review are inapplicable. The Court of Appeal's order holding that petitioners' appeal was not filed within a "reasonable time" is therefore in direct conflict with this Court's decision in Insurance Corporation of Ireland v. Campagnie des Bauxites de Guinee, id., wherein the Court stated:

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[10] In Persinger v. The Islamic Republic of Iran, C.A. No. 81-00230 (D.C. Cir. 1982), although subsequently withdrawn, it is instructive that the D.C. Circuit Court of Appeals addressed this issue stating that "if a court lacks jurisdiction it has no power to reach the merits. Subject matter jurisdiction . . . is an Article III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. (citation omitted) That characterization includes limits to the powers of federal courts. To exceed those limits is to exercise power illegitimately."

> No action of the parties can confer subject matter jurisdiction upon a federal court. Thus the consent of the parties is irrelevant (citation omitted), the principles of estoppel do not apply (citation omitted), and a party does not waive the requirements by failing to challenge jurisdiction early in the proceedings. 102 S. Ct. at 2104. (Emphasis added.)

This principle also holds true where delegation of jurisdiction is in a United States Magistrate. It is obvious that the district court cannot by rule confer on a Magistrate jurisdiction not permitted by statute. Neither can consent of the parties authorize a Magistrate to enter final judgments where power to act in such an area is restricted by statute. United Steelworkers v. Bishop, 598 F.2d 408, 411 col. 2 (5th Cir. 1979); McDonnell Douglas Corp. v. Commodore Bus. Machines, Inc., 656 F.2d 1309, 1312 (9th Cir. 1981); United States v. First National Bank, 628 F.2d 871, 873 (5th Cir. 1980); See Harding v. Kurko, Inc., 603 F.2d 813 (10th Cir. 1979); Horton v. State Street Bank & Trust Company, 590

F.2d 403 (1st Cir. 1979); Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978); United States v. Raddatz, supra. The District Court's decision is in direct conflict with the foregoing Circuit Courts of Appeals and must be resolved to avoid any similar constitutional violations of class members' rights.

The law is clear that neither the petitioners nor any other party, including the District Court, can confer upon the Magistrate the unreviewable final decision-making authority delegated by the District Court's April 25, 1978 order. [11] In Alexander v. Gardner-Denver Co., supra, this Court indicated the importance of providing a judicial forum for deciding Title VII actions by stating that:

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[11] cf. In Re James M. Morrison, Sr., CA. No. 83-3052 (3rd Cir., Sept. 19, 1983). "[T]he jurisdiction of a magistrate to decide a case is not based solely on the consent of the parties but derives from a proper delegation." (Emphasis added.)

> [C]ourts shall ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum. (Emphasis added.) 415 U.S. at 60 N.21.

The District Court, with the concurrence of the Court of Appeals, ignored its duty to assure the availability of an Article III judicial forum and unconstitutionally delegated that authority to a United States Magistrate. In its April 25, 1978 order the District Court exceeded its constitutional authority by approving the waiver of a non-waivable constitutional right provided by Article III of the United States Constitution.

In Pacemaker Diagnostic Clinic v. Instromedix, Inc., supra, a panel of the Ninth Circuit addressed the constitutional soundness of the consent provision of the 1978 Federal

Magistrates Act and in pertinent part stated that:

> [R]ather than being exclusively a due process right of the litigants waivable by them, the requirement of an Article III judge is jurisdictional and not waivable. (Emphasis added.) 712 F.2d at 1312 [12]

See Wharton-Thomas v. United States, 52 LW 2309 (December 16, 1983). (The limits on the District Court's subject matter jurisdiction, as set by

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[12] Even though this decision was reversed en banc (Pacemaker Diagnostic Clinic v. Instromedix, Inc. F.2d (9th Cir. 1984) and involves the 1978 Magistrates Act "consent provision" and the instant petition involves the 1976 Magistrates Act, which is void of a consent provision, it is instructive that Congress thought it necessary to legislate such a provision. See also Goldstein v. Kelliher, 1st Cir. No. 83-1411; Gammal v. Hamrock, 1st Cir. No. 83-1084; Collins v. Foreman et. al., No. 75-139 (B) (C); Williams v. Mussomelli, 3rd Cir. No. 83-5035.; American Postal Union Workers v. American Postal Union Service, 5th Cir. No. 83-4122; Lehman Bros., Kuhn, Loeb, Inc. v. Clark Oil Refining Corp., 8th Cir. No. 83-1874; Fields v. Washington Metropolitan Area Trans. Authority, D.C. Cir. No. 83-1166; all the foregoing appeals challenge the Magistrate's authority.

the constitution may not be waived by agreement of the parties); see also United States v. Raddatz, supra, (that displacement of an Article III Judge by a Magistrate implicates both due process and Article III concerns). The District Court's decision permitting and approving the waiver of the constitutional right to an Article III judge conflicts with Third Circuit's opinion. Furthermore, the delegation of authority pursuant to the 1976 Magistrates Act in the instant appeal is more egregious then the delegation of authority in Pacemaker, supra., in that (1) there was no statutory consent basis for the delegation; (2) the ultimate decision remained with the magistrate; and (3) there was no right of appeal. [13] The District Court's order clearly exceeds its

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[13] In Pacemaker, supra, the Appeals Court panel rejected the following rationale submitted to justify the delegation: (1) that the statute's saving clause supported the delegation; (2) analogy to arbitration proceedings; and (3) it is strictly a due process right waivable by the parties.

constitutional authority and is void. See Hill v. Duriorn Co., 603 F.2d 1208 (6th Cir. 1981); Taylor v. Oxford, 575 F.2d 952 (7th Cir. 1972); Horton v. State Street Bank & Trust Company, 590 F.2d. 403, 404 (1st Cir. 1979).

D. The District Court's April 25, 1978 order did not insure that the claims procedure would meet the requirements of Constitutional Due Process since it deprived petitioners of make whole relief provided for by Stage II of a Title VII proceeding.

Petitioners assert that the Settlement order claims procedure deprived them of their due process right, with no assurances or safeguards to protect those rights. Logan v. Zimmerman Brush Co., _U.S._, 102 S. Ct. 1148,1154 (1982) (citing Mullane, supra, for the proposition that termination of every right of a beneficiary is "impermissible unless constitutionally adequate notice and hearing procedures . . . [are] established before the settlement process . . . [goes] into effect.") A case in point is petitioner Wanda D. Foster. The Government admitted to

discriminating against this petitioner and offered her substantially less than she was entitled to in order to settle her claim. Since liability with regard to Petitioner Foster had already been established, the sole issue before the magistrate was to determine the extent of backpay liability. Instead, the magistrate, unsupervised by the District Court, exceeded his authority, over the petitioners' objection, by going beyond the issue appealed (backpay) and improperly permitted the litigation of petitioner's liability even though such liability had been admitted. Petitioner Foster was entitled to a full, make-whole remedy, which she was denied. Albermarle v. Moody, 422 U.S. 405, 419 (1975); Garza v. Brownsville Independent School District et al., 700 F.2d 253 (5th Cir. 1983). This Court must not allow the wholesale deprivation of petitioners' statutory and constitutional rights to go unchallenged for less than what they would have been entitled. The lower court should be

ordered to apply the proper Stage II relief standard to which petitioners are entitled. Plummer v. Chemical Bank, 668 F.2d 654 (2nd Cir. 1982); Franks v. Kroger Co., 649 F.2d 1216 (6th Cir. 1981).

III. Conclusion

For all of the foregoing reasons, a writ of certiorari ought to issue to review the judgment of the District of Columbia Circuit Court of Appeals, and the lower courts decision must be summarily reversed.

Respectfully submitted,

Terrence Willingham
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(703) 548-3974

Counsel for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

No. 83-1063 September Term, 1983

January 10, 1984

Civil Action No. 76-00079

Donald L. Bachman, on behalf of himself and others similarly situated, et al.

v.

James Miller, individually and in his official capacity as Chairman of the Federal Trade Commission, et al.

Wanda D. Foster and Terrence Willingham

Appellants

And Consolidated Case No. 83-1064

BEFORE: Edwards and Ginsburg, Circuit Judges and MacKinnon, Senior Circuit Judge

O R D E R

On consideration of the Motion for Reconsideration of Appellants Foster and Willingham,

filed December 19, 1983, it is

ORDERED by the Court that the aforesaid Motion is denied.

For The Court:

GEORGE A. FISHER, CLERK

By: /s/Robert A. Bonner

Robert A. Bonner

Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

No. 83-1063 September Term, 1983

January 10, 1984

Civil Action no. 76-00079

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UNITED STATES COURT OF APPEALS

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No. 83-1063 September Term, 1983

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Donald L. Bachman, on behalf of himself and others similarly situated, et al.

v.

James Miller, individually and in his official capacity as Chairman of the Federal Trade Commission, et al.

Wanda D. Foster and Terrence Willingham

Appellants

And Consolidated Case No. 83-1064

BEFORE: Edwards and Ginsburg, Circuit Judges and MacKinnon, Senior Circuit Judge

O R D E R

On consideration of the Motion for Reconsideration of Appellants Foster and Willingham, filed December 16, 1983, it is

ORDERED by the Court that the aforesaid Motion is denied.

For The Court:

GEORGE A. FISHER, CLERK

By: /s/Robert A. Bonner

Robert A. Bonner

Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

No. 83-1063 September Term, 1983

Civil Action no. 76-00079

Donald L. Bachman, on behalf of himself and others similarly situated, et al.

v.

James Miller, individually and in his official capacity as Chairman of the Federal Trade Commission, et al.

APPENDIX B

November 7, 1983

No. 83-1063

United States Court of Appeals

September Term, 1983

Civil Action No. 76-000079

Donald L Bachman, on behalf of himself and others similarly situated, et. al.

v.

James Miller, individually and in his official capacity as Chairman of the Federal Trade Commission, et. al.

Wanda D. Foster and Terrence Willingham,

Appellants

No. 83-1064

Donald L. Bachman, on behalf of himself and others similarly situated, et. al.

v.

James Miller, individually and in his official

Wanda D. Foster and Terrence Willingham

Appellants

And Consolidated Case No. 83-1064

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges and MacKinnon, Senior Circuit Judge

O R D E R

The Motion for En Banc Consideration of Appellants Foster and Willingham, filed December 16, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid motion is denied.

For The Court:

GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner

Robert A. Bonner

Chief Deputy Clerk

capacity as Chairman of the Federal Trade Commission, et. al.

Dalton Howard,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: EDWARDS and GINSBURG, Circuit Judges and MacKINNON, Senior Circuit Judge

Nos. 83-1063/64

J U D G M E N T

This case was received on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel for the parties. We have accorded full consideration to the issues presented; they occasion no need for an opinion. See D.C. Cir. R. 13 (c). For the reasons stated in the accompanying memorandum it is

ORDERED AND ADJUDGED that the order from which this appeal has been taken is affirmed. It is

FURTHER ORDERED that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 14, as amended on November 30, 1981, and June 15, 1982.

Per Curiam

For The Court

George A. Fisher

Clerk

Nos. 83-1063/64 - Bachman v. Miller

MEMORANDUM

Appellants moved in the District Court on July 12, 1982, for relief pursuant to Fed. R. Civ. P. 60 (b) from portions of a class action settlement order entered on April 25, 1978. Rule

60 (b) motions must be made "within a reasonable time." It is evident from the record before us that appellants neglected to raise the issues they now seek to air within a reasonable time. Their motion should have been denied on that account.

Appellants' counsel, it is not disputed, knew of the entry of the settlement order before the time to appeal had expired. Appellants, all of whom are lawyers, concede that in 1979, they had actual notice of the terms of the settlement. They offer no tenable reason for withholding for years their application to set aside part of the settlement. Because the untimeliness of their Rule 60 (b) motion is apparent, we do not address the issues they tendered to the District Court, and express no view on the responses to their arguments presented in the District Court's

November 3, 1982, opinion.

APPENDIX C

MEMORANDUM OPINION

Charles R. Richey, District Judge

BACKGROUND

The case of Bachman v. Pertschuk[1] resulted in the most far reaching affirmative action program ever developed for professional people. Before this Court, plaintiffs, minority professional persons, sought to vindicate themselves from perceived discrimination at the Federal Trade Commission ("FTC"). The matter was resolved in the form of a settlement agreement that was approved by the Court on April 25, 1978.

The settlement agreement[2] provided for a

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[1] The name was changed to Bachman v. Miller when James Miller replaced Michael Pertschuk as head of the FTC.

[2] The Settlement Stipulation and Order approved by this Court on April 25, 1978 is attached hereto and incorporated herein for convenient reference. [Omitted from published opinion--Editor.]

broad plan to ensure against discrimination at the FTC in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. The settlement also provided a post-settlement procedure for resolution of individual claims. Any class member who believed himself or herself to be the victim of discrimination could submit a claim to the Administrator of the settlement who was empowered to grant relief. If the claimant remained unsatisfied, she/he could appeal the Administrator's decision to a United States Magistrate. By consent of parties and in full compliance with the notice and comment requirement of Rule 23 of the Federal Rules of Civil Procedure the decision of the Magistrate was to be the final and unappealable disposition of the claim.

This matter is before the Court on the

motion of three members of the plaintiff class ("movants") to vacate the portion of the settlement agreement making the Magistrate's decision unappealable.[3] Movants aver that this portion of the settlement should be vacated because it denies them their constitutional right to have their claims heard by an Article III Judge, which right they claim was neither waived nor waivable. Movants further allege that they did not receive adequate notice. They thus conclude that the Court has a "right and a duty" to vacate the no-appeals clause of the settlement under both the agreement itself and Fed.R.Civ.P. 60(b). The Court does not find merit in Movants' arguments and for the reasons set forth herein will deny

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[3] Movants are 3 Black attorneys--Wanda Foster, Dalton Howard and Terrence Willingham--who applied for positions with the FTC but were not hired.

Movants' Motion. [4]

Point I

MOVANTS WERE NOT DENIED THE RIGHT TO AN ARTICLE III FORUM

[1] Movants first allege that they have an unwaivable right to have their claims of discrimination heard by an Article III Judge. They aver that the claims procedure established by the settlement agreement denies them this right because it makes the Magistrate's ruling final and unappealable. However, this argument misapprehends the purpose of the settlement agreement and the post-settlement claims process that it establishes.

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[4] Movants first attempted to appeal directly to the Court of Appeals for the District of Columbia Circuit. That Court rejected their claim finding that it was not properly before the Court. Bachman v. Pertschuk, No. 81-1906 (D.C.Cir., Feb. 6, 1982) (Mem.).

On July 29, 1976 this Court certified a class consisting of a large group of individuals who alleged that they had been discriminated against by the FTC. Movants were clearly within the class certified by this Court. Thus, any claim of discrimination that they had against the FTC was disposed of in the final resolution of this case. That final resolution came in the form of a settlement agreement.[5] See Gendron v. Shastina Properties, Inc., 578 F.2d 1313, 1315 (9th Cir.1979) (settlement constitutes final disposition of the case). From the time of the

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[5] The settlement became final and unappealable when no appeal was taken within the 60 day period provided by Rule 4(a) Fed.R.App.P. See Browder v. Director, Department of Corrections, 434 U.S. 257, 264, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978) (time period for appeal is jurisdictional).

approval of the settlement by this Court, any claim of discrimination Movants may have had against the FTC was res judicata--the settlement agreement itself finally disposed of Movant's claims.

To ensure that each individual would have an opportunity to be heard, the settlement agreement provided an additional remedy--an individual claims procedure.[6] Movants each filed a claim

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[6] If the settlement had provided that each plaintiff was entitled to receive $5, that provision would have constituted a final disposition of Movants' claims and they could not be heard to complain that they were denied their right to an Article III forum. Here, each plaintiff was given an extra opportunity to assert an individual claim. This opportunity was not in contravention of their constitutional rights. In fact, they had already received everything to which they were constitutionally entitled. Rather, this opportunity was additional relief provided by the consent of the parties.

under this procedure with the Administrator of the settlement. Upon denial of their claims, they appealed to a United States Magistrate (as the stipulation provided) who also found that their claims lacked merit. When Movants brought their claims before the Administrator and then the Magistrate, their requests for relief arose under the settlement agreement. Their claims were no longer Title VII claims because the Movants' rights under Title VII were fully and finally resolved in the settlement agreement, entered into in an Article III forum and approved by an Article III Court. Thus, Movants' allegation that they have a right to have their additional individual claims heard by an Article III Judge must fail and it is unnecessary for the Court to consider whether such a right is waiv-

able or was waived by Movants here.[7]

Point II

ADEQUATE NOTICE WAS PROVIDED TO MOVANTS AS MEMBERS OF THE PLAINTIFF CLASS

[2] Movants also argue that they did not receive adequate notice and thus were not aware that when they submitted their claim to the Administrator they could not appeal to an Article

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[7] Movants' request that the Court set aside a "portion" of the settlement would deprive defendant nearly completely of the benefit it hoped to achieve through class settlement--release from the expense of defending against, and potential liability in, numerous individual suits over a long period of years at great expense to the litigants and the Judiciary and its inadequate resources. To do as plaintiffs urge would bring about a greatly disfavored result since it is widely recognized that settlement, especially of Title VII suits, is to be encouraged. See Carson v. American Brands, 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 998 n. 14, 67 L.Ed.2d 59 (1981).

III Court.[8] Although this allegation appears in the context of Movants' argument that there could be no waiver of their rights to an Article III Judge because they were not under notice, the Court will address the issue in its own right because it goes to the heart of the question of whether Movants should properly be bound by the settlement agreement.

On January 17, 1978 this Court condition-

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[8] The Court is not entirely convinced that Movants, all practicing attorneys, could reasonably have assumed that they were free to fully ultilize the claims procedure provided in the settlement and then pursue their claims further to an Article III forum if they were dissatisfied with the result. It would be a strange class settlement indeed that purported to resolve the issues presented and yet allowed each individual class member to pursue a separate suit.

ally approved the settlement agreement submitted by the parties in Bachman. On February 2, 1978 the Court ordered that notice of the proposed settlement and its terms be disseminated to the plaintiff class. Pursuant to this Order, notice was mailed to all known plaintiffs. Additionally, notice was published in a number of newspapers and journals for a period of weeks in an attempt to notify class members that the Court recognized "may be difficult to identify and/or locate (e.g., rejected applicants)."

Notice to the class was provided pursuant to Fed.R.Civ.P. 23(a). Rule 23(e) provides that notice of a proposed "compromise shall be given to all members of the class in such a manner as the Court directs." By its terms, Rule 23(e) vests broad discretion in the court to determine

what constitutes adequate notice. See C. Wright & A. Miller, Federal Practice & Procedure ¶ 1799 at 237. Moreover, publication has been widely recognized as a proper method of notice for class members who cannot reasonably be individual identified and/or located.[9] See e.g., Mendoza v. United States, 623 F.2d 1338, 1351 (9th Cir.1980)

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9 Movants were among a group of approximately 25,000 to 35,000 individuals who unsuccessfully applied for positions as attorneys with the FTC. Given the size of this group it is not difficult to understand why Movants were not individually identified and noticed.

Additionally, the Court notes that publication was a method of notice particularly well suited to bringing this matter to Movants' attention because all of them were practicing attorneys in the Washington area at the time of the settlement. In addition to the published notices, the settlement received considerable press coverage which further increased the likelihood that Movants would be, or were alerted to the fact of the settlement.

cert. denied, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 (1981); Luevano v. Campbell, 93 F.R.D. 68 (D.D.C.1981); Quigley v. Braniff Airways, Inc., 85 F.R.D. 74, 77 (N.D.Tex.1979). Thus, the Court concludes that adequate notice was provided to the plaintiff class and the FTC did not "default in providing movants with proper notice," as movants allege.

In light of the Court's rejection of Movants' claims, it is unnecessary to consider whether the Court has the power to grant Movants the relief they requested either under the terms of the settlement agreement or Fed.R.Civ.P. 60(b).

An Order consistent with foregoing will be issued of even date herewith.